

Montefiore Medical Center and International Brotherhood of Security Personnel, Officers, and Guards, Case 2-CA-19343

16 July 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

On 29 December 1983 Administrative Law Judge D. Barry Morris issued the attached decision. The Union filed exceptions and a supporting brief, and the Respondent filed an opposing brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings,² and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ The Union excepts to the judge's refusal to grant the Respondent's motion to correct the transcript and record a missing part of the record. We note, however, that the judge did correct the transcript. Also, having taken into account page numbers, the dates on which the hearing in these proceedings was held and continuity of subject matter of the testimony presented, our review of the record convinces us that the corrected record is complete and that substantial portions of testimony have not been omitted as the Union alleges.

² The Union has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in New York City, New York, on June 6, 7, and 15, 1983. On a charge filed on January 5, 1983, a complaint was issued on March 10, 1983, alleging that Montefiore Medical Center (Respondent)¹ violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

¹ The names of the Respondent and the Union, International Brotherhood of Security Personnel, Officers and Guards, were amended at the hearing. The names in the complaint were originally Montefiore Hospital and Medical Center and Brotherhood of Security Personnel, Officers and Guards International Union.

The parties were given full opportunity to participate, to produce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs were filed by the General Counsel and Respondent.

On the entire record of the case, including my observation of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, with an office and place of business in Bronx, New York, operates a hospital providing inpatient and outpatient medical and professional care services for private patients. Its annual volume of business is in excess of \$250,000 and it purchases and receives at its facility materials valued in excess of \$50,000 directly from firms located outside New York State. Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act, and I so find. The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The issues are:

1. Did Respondent urge and encourage its employee Ray Puello to circulate a decertification petition.
2. Did Respondent refuse to grant Puello's request for a shift change because he refused to circulate the decertification petition.
3. Did Respondent discharge Puello because he refused to circulate the decertification petition.
4. Did Respondent discharge Puello because he filed and continued to process a grievance over Respondent's refusal to grant the shift change.

B. The Facts

1. Background

Puello was employed by Montefiore Medical Center as a security officer from November 15, 1981, until December 23, 1982,² when he was discharged. He initially worked the 4 p.m. to midnight shift. On December 11, 1981, he requested a change to the 8 a.m. to 4 p.m. shift so that he could attend college. That request was granted effective January 19, 1982.

2. Request for shift change

Puello testified that in September he requested a change back to the 4 p.m. to midnight shift. He further testified that "once a month" he submitted written shift change requests but that he received no replies to the requests.

Puello testified that about 2 weeks before Thanksgiving he asked Donald Fleming, director of security, about his request for a shift change, to which Fleming replied

² All dates refer to 1982 unless otherwise specified.

that "he would get back to me on that." Puello testified that Fleming then asked him about the Union and Fleming told him "he would like to see a strong union behind us, and he felt the union we had was very weak." Puello testified that Fleming then suggested that Puello file a decertification petition and that Fleming then showed Puello what such a petition would look like. Puello replied to Fleming that "I am not too familiar with unions, but I don't think I am allowed to do that." About a week after this alleged discussion with Fleming, Puello testified that he discovered that he did not receive his requested shift change. Instead, security guard Winston Thomas received the shift change.

On August 10, Thomas requested a change to the 4 p.m. to midnight shift because he was "registered to attend school during the hours of 9 a.m. to 2:30 p.m." The shift change was granted and made effective November 22, 1982. Thomas testified that he circulated a decertification petition for 2 days beginning November 19, 1982. He further testified that neither Fleming nor any other supervisory employee asked him to circulate the decertification petition.

Fleming, who appeared to me to be a credible witness, testified that he never had a discussion with Puello concerning union matters nor did he ever discuss with him the preparation of a petition for decertification of the Union. With respect to why Puello was not granted his requested shift change, Fleming testified that he considered four issues, namely, seniority, performance, reason, and need. With respect to need, Fleming testified that inasmuch as Thomas already was enrolled in school, he believed Thomas' need for the shift change was greater than Puello's. With respect to performance, Fleming testified that Puello's performance record was poor inasmuch as his folder contained a number of warning notices and suspensions.

3. Filing of grievance

On December 3, Puello filed a grievance with Respondent alleging that his seniority rights had been violated when he was denied his request for a shift change. A grievance meeting was held on December 21, at which time union delegates Payton and Gonzalez, Union President Joseph Overton, Fleming, and Puello were present. Fleming distributed General Counsel's Exhibit 7 which contained a list of Puello's "violations." These included several instances of allegations that Puello was sleeping on the premises, including the allegation that on November 30 he was found sleeping on a staircase; several occasions when Puello was given warnings for taking extended breaks; and several occasions when he failed to return his assigned equipment to the security office. The exhibit continues:

[In] light of the fact that this employee has been given ample verbal and written warnings, as well as suspensions, regarding his conduct, especially in relation to sleeping while on duty, and while not on duty, will be terminated immediately.

Fleming credibly testified that Overton asked him if something could be worked out, to which he replied,

"there's nothing that could be worked out. I said that there are just too many things for me to make a reversal on my decision." When asked by Overton whether Puello's filing of a grievance had anything to do with the decision to terminate him, Fleming replied that "one has no bearing on the other to me."

4. Conclusions as to shift change

The complaint alleges that Respondent refused to grant Puello's request for a shift change and discharged him because he refused to circulate a decertification petition requested by Fleming. I have credited Fleming's testimony that he made no such request of Puello. Indeed, it seems implausible that a supervisor would ask an employee to petition to decertify a "weak" union because "he would like to see a strong union" in its place. In addition, Puello's testimony indicates several inconsistencies. Thus with respect to an extended break on December 8, Puello testified, "I didn't have keys and the radio I had wasn't working." Respondent's Exhibit 2, however, which is the report that Puello submitted with respect to the events of December 8, indicates that he in fact did have the keys. Concerning the incident on November 30, Puello testified that he was injured in a fight and went to the emergency room at Montefiore and "registered and I got a band on my hand." Fleming, however, credibly testified that the matter was investigated and no record was found of Puello having been processed in the emergency room at that time.

I conclude that the General Counsel has not sustained his burden of showing by a preponderance of the evidence that Fleming, or any other supervisor, urged or encouraged Puello to circulate a petition seeking the decertification of the Union. Clearly, therefore, the failure to grant Puello's requested shift change was not because Puello refused to circulate the decertification petition. On the contrary, I have credited Fleming's testimony that Puello was not granted the shift change because of his poor performance record and the fact that another employee's need for a shift change, in Fleming's view, was greater than Puello's need for that change. Accordingly, the allegation is dismissed.

5. Conclusions as to filing of grievance and termination

Paragraph 9 of the complaint, as amended, alleges that Respondent discharged Puello and has failed to reinstate him because he filed and continued to process a grievance over Respondent's refusal to approve the shift change. While Puello testified that Fleming told him at the grievance meeting, "You take back that grievance and I'll forget about that termination," I credit Fleming's testimony that no such conversation took place. As stated earlier, Fleming appeared to me to be a credible witness. In addition, in view of Puello's poor performance record, it is unlikely that Fleming would have made such a statement. Fleming credibly testified that other employees filed grievances and they were not discharged. Thus, Payton had a grievance pending at the same time as Puello, yet Payton was not discharged. Similarly, Walker filed a grievance on October 11 and he

was not discharged. Instead, I credit Fleming's testimony that Puello was discharged because of his poor performance record. Accordingly, the allegation is dismissed.³

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

³ Certain errors in the transcript are noted and corrected.

3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record in this proceeding, I issue the following recommended⁴

ORDER

The complaint is dismissed in its entirety.

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.